United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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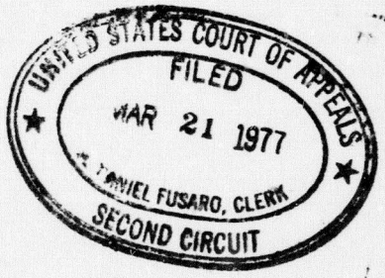
77-5002

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



In Re:

W. T. GRANT COMPANY,

Bankrupt.

PAUL S. BERGER, Trustee, and RONALD M. LEE and SUTRO MORTGAGE INVESTMENT TRUST, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

- against -

CHARLES G. PODMAN, Trustee in Bankruptcy of W. T. GRANT COMPANY, Bankrupt,

Defendant-Appellee.

B P/S

On Appeal From a Memorandum Opinion and Order of the United States District Court for the Southern District of New York

APPELLANTS' BRIEF

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re:	
W. T. GRANT COMPANY,	
Bankrupt,	
PAUL S. BERGER, Trustee, and RONALD M. LEE and SUTRO MORTGAGE INVESTMENT TRUST, Individually and on behalf of all others similarly situated,	In Bankruptcy No. 75 B 1735
Plaintiffs' Appellants,	APPELLANTS' BRIEF
- against -	
CHARLES G. RODMAN, Trustee in Bankruptcy of W. T. GRANT COMPANY, Bankrupt,	
Defendant/Appellee.	

PRELIMINARY STATEMENT

This is an appeal from the order of the Honorable Irving Ben Cooper, Judge of the United States District Court for the Southern District of New York dated December 21, 1976 (unreported) affirming orders of the Honorable John J. Galgay, Bankruptcy Judge, which:

(a) denied plaintiffs/appellants' motion for an extension of time to file a notice of appeal from the order of Judge Galgay entered July 29, 1976;

(b) denied plaintiffs/appellants' motion for a nunc pro tunc order vacating the entry of the July 29, 1976 order and re-entering said order so as to allow the timely filing of a notice of appeal; and

(c) denied plaintiffs/appellants' motion for rehearing and reconsideration of the order denying the nunc pro tunc order

FACTS

In January, 1976, plaintiffs/appellants commenced a class action within the W. T. GRANT COMPANY Chapter XI proceedings to enforce their rights and the rights of GRANT's other landlords. The gravamen of the complaint was that GRANT, as debtor in possession, under the protective powers of the Bankruptcy Court, was holding plaintiffs' real property for ransom (A25). It alleged that by retaining its leasehold estates without, however, continuing to pay for the use and occupation of the real property, GRANT was misusing the court's powers to coerce the landlords to forfeit the rights guaranteed to them by the Constitution of the United States and the bankruptcy law (A25).

In February, 1976, GRANT moved to dismiss the complaint for failure to state a claim upon which relief could be granted (A67). In connection with said motion, on ex parte application, GRANT obtained an order staying all discovery proceedings. The motion was argued on March 16, 1976. Several other motions, including plaintiffs/appellants' motion for class certification, originally calendared for March 16, 1976, were successively adjourned from time to time thereafter upon the premises that, should the motion to dismiss be granted, the remaining motions would be moot (A67).

For several months following the March 16, 1976 argument, counsel for plaintiffs periodically called or appeared at court in order to ascertain whether a decision had been entered. Because the conduct complained of became more oppressive with the passage of time, plaintiffs, on June 8, 1976, brought on a motion in district court for relief in the nature of mandamus, requiring the Bankruptcy Court to rule on the motion to dismiss (A67). This motion, coincidentally, was denied by the District Court on the same day that the Bankruptcy Court's order was entered -- July 29, 1976. (A6).

By letter dated August 2, 1976, the Bankruptcy Court informed counsel that the court had entered an opinion regarding one of the matters under submission. Without identifying which matter was decided, or how it was decided, the letter advised that, "It is 'So Ordered'. A copy of the opinion may be obtained in the Clerk's Office, Room 230." (A35). This letter was received in New York by associate counsel on August 5, 1976 (A68). New York counsel obtained a copy of the opinion from Room 230 and forwarded it to plaintiffs in California. It arrived on August 9, 1976 (A69).

On August 11, 1976, plaintiffs, through California counsel, mailed a letter directed and addressed to Judge Galgay personally with a request that an enclosed notice of appeal be filed (A69). This letter was apparently not received by the Bankruptcy

Court until August 16, 1976, when the notice of appeal was filed by the Clerk of the Court (A70). The letter was then returned to California counsel with the notation:

> "Gentlemen:
>
> This is to advise you that your Notice of Appeal has been received by our office. It is appealing an order docketed on 7/29/76, therefore the filing of this appeal is late.
>
> Also, there is a $10.00 filing fee to be paid by certified check or money order to Clerk of Court.
>
> Your appeal has been docketed on 8/16/76 and sent in to Judge Galgays Secretary. Copy of your appeal has been mailed to attorney for Bankrupt.
>
> ENCLOSED IS NOTICE OF BANKRUPTCY RULE 806." (A105).

(Rule 806 requires the appellant to file and serve a designation of records and issued on appeal within ten days after the filing of the notice of appeal.)

Upon receipt of the letter with the above notation, California counsel forwarded the $10.00 filing fee and, within the time provided by Rule 806, filed a designation of records and a statement of issues on appeal (A106).

By notice of motion dated August 30, 1976, GRANT's counsel moved in the District Court for an order dismissing plaintiffs' appeal from Judge Galgay's order entered July 29, 1976 (A41).

By order to show cause dated September 8, 1976, plaintiffs made an application before Judge Galgay for an order pursuant to Bankruptcy Rule 802(c) granting an extension of time to file the

notice of appeal to and including August 16, 1976, the date upon which such notice of appeal was actually filed by the court (A13).

On September 14, 1976, Judge Galgay, acknowledging that a novel situation was presented, and finding that "There exists excusable neglect, probably the fault of the postal service, possibly the crush of business in my own clerk's office," (A84), nevertheless denied the application, holding that he was "without power to extend beyond the thirty days the right to file an appeal." (A85).

The notice of appeal was actually filed on August 16, 1976, seven days after the expiration of the ten day period commencing with the filing of the July 29 order (A13). This 7-day delay is equal to the amount of delay between the time the order was entered and the time that counsel received notice thereof. The notice received by counsel did not reveal that the order had been entered during the week preceding the August 2, 1976 notification (A35).

By order to show cause dated September 20, 1976, plaintiffs moved for reargument and reconsideration of Judge Galgay's decision and order denying the application for an extension of time or, in the alternative, for an order vacating the order entered July 29, 1976 and re-entering such order so that, in the interest of justice, a notice of appeal could be timely filed (A87). By order dated October 1, 1976, Judge Galgay denied

plaintiff's application for reargument and/or reconsideration in all respects (A132).

ARGUMENT

I

THE COURT HAD THE POWER TO GRANT PLAINTIFF/APPELLANTS THE RELIEF REQUESTED BELOW AND ABUSED ITS DISCRETION BY FAILING TO GRANT SUCH RELIEF.

Rule 60(b), Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by Bankruptcy Rule 924, provides that,

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise or excusable neglect;
>
> * * *
>
> (6) any other reason justifying relief from the operation of the judgment."

Appellants submit that elementary principles of fairness require that relief be granted and respectfully invoke the principle that every litigant is entitled to both the appearance and reality of justice at the hands of the court, as a "reason justifying relief from the operation of the judgment". Rule 60(b) Federal Rules of Civil Procedure.

Appellants have not had their day in court.

The merits of the complaint filed in January, 1976, are not in issue here. They can only be placed in issue if appellants

are allowed to appeal the judgment of Judge Galgay dismissing the complaint. Apart from the question of whether or not the bankruptcy judge was correct in his interpretation of the law, it must be pointed out that the motion to dismiss was treated as a motion for summary judgment after it was submitted to the judge (A22) and at a time when plaintiffs were enjoined from conducting any discovery, in clear violation of the command of Federal Rule of Civil Procedure 12(b) that, "...All parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56."

Moreover, the record in this matter is quite clear that at all times it was appellants, and only appellants, who constantly sought to expedite these proceedings. Appellants even attempted to get mandamus issued requiring the judge to rule on the motion to dismiss (A4; docket entry 6/3/76).

Under these circumstances, to invoke the principle, as Judge Cooper does, that the purpose of the Bankruptcy Rules is to expedite bankruptcy proceedings (A145), as a means of denying appellants' relief, is an unwarranted and unseemly basis which, appellants submit, does not reflect favorably upon the quality of justice obtainable in the courts to which appellants have been required to submit their arguments.

When plaintiffs received the Bankruptcy Court's notice dated August 2nd, together with the opinion forwarded by New York

counsel, it was the last day to file notice of appeal in accordance with Rule 802(a).[1] This fact was unknown to counsel, however, because the notice did not reveal the fact that the order had been entered the preceding week. Because Bankruptcy Rule 922(a) requires the referee to immediately give notice upon entry of a judgment or order made by him and because that notice was dated August 2, 1976, counsel was misled into thinking that the time to file notice of appeal had not yet expired.[2]

Appellants contend that it would be an abuse of discretion to deny them the relief made available by Federal Rule of Civil Procedure 60(b) and, by so doing, deny them their day in court, for the following reasons:

(a) The complaint attacks a course of conduct conducted with the participation and encouragement of the Bankruptcy Court itself.

---

1. Reference to a particular Rule without further description in this brief shall mean a reference to the Rules of Bankruptcy Procedure.

2. Had New York counsel not obtained the opinion and mailed it to California counsel, appellants would not have known what matter had been ruled on, nor would they have known whether they had won or lost. One of the principal arguments made by appellants in these proceedings has been that it is a tremendous burden for out-of-state parties to either send their counsel to New York, retain local counsel, or both. This argument has been rejected by Judge Galgay. Without hiring local counsel, however, appellants would be severely hindered, if not prevented, from filing a timely notice of appeal, even if the court had given timely notice of its ruling. Under the bankruptcy rules, filing is not complete upon mailing, but only upon actual, physical filing. Bankruptcy Rule 509(b).

(b) The communications and actions of the Bankruptcy Court concerning the entry of the July 29th order and appellants' appeal therefrom were vague and misleading. Not only did the court fail to inform appellants of the nature of the ruling and the date it was entered, but the actions of the court were such as to lull appellants into the belief that the appeal would proceed, to wit:

(i) The notice of appeal was apparently received more than ten days after the entry of the order. This was not known to appellants, but was known to the court. Instead of rejecting the notice of appeal, however, the court caused it to be filed. Appellants were then notified that the appeal had been docketed (A105). They were further given notice -- as if the appeal were proceeding -- of the requirements of Rule 806, requiring the filing of a designation of record and issued on appeal within ten days. They were further requested -- as if the appeal were proceeding -- to pay the $10.00 fee (A105).

(ii) The $10.00 fee was promptly forwarded and was accepted by the court.

(iii) The designation of record and issues on appeal was prepared and was accepted and filed by the court (A7 docket entry 9/1/76).

(c) Not only considerations of equity, but considerations of due process, apply. It is true that Rule 802(a) requires

a notice of appeal to be filed within ten days of the entry of the order, just as it is true that Rule 922 requires the referee to serve notice of entry of the order immediately.[3]

---

3. It is also true that Rule 922 states that it does not matter whether the referee gives the notice required by that rule or not. Conceivably, therefore, the court might have entered an order in June and delayed sending out notification until August. This would be the equivalent of a rule stating, "No appeal may be taken from an order of the referee." Obviously, such a rule would be a denial of due process. But under the circumstances herein, where a notice of appeal is to be filed in the Bankruptcy Court in New York by counsel in California, within ten days of its entry and no notice of the date of the entry of the order is given, is not a strict and literal enforcement of the provisions of Rule 802 the equivalent of a rule that "no appeal may be taken"? Isn't that especially so when it involves out-of-town counsel? Isn't it, therefore, not only a violation of due process, but also a denial of equal protection?

II

RULE 802(c) OF THE RULES OF BANKRUPTCY PROCEDURE PERMITS THE COURT TO GRANT AN EXTENSION OF TIME TO FILE AN APPEAL BEYOND THE TEN-DAY PERIOD, EVEN THOUGH THE REQUEST THEREFOR IS MADE AFTER THE EXPIRATION OF THIRTY DAYS FROM THE DATE OF ENTRY OF THE ORDER, WHEN THE NOTICE OF APPEAL HAS ACTUALLY BEEN FILED WITHIN THE THIRTY-DAY PERIOD.

Rule 802(c) provides:

> "The referee may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property." (emphasis added)

Rule 802(c) clearly allows a request for extension of time to be made after the expiration of the time period provided in that rule. The order appellants seek to appeal from does not authorize the sale of any property. The bankruptcy court has found that there was excusable neglect. The notice of appeal was filed within the allowable thirty-day period (A105).

Appellants, by their various motions, have sought only to "legitimize" the notice of appeal that was filed on August 16, 1976. While the advisory committee comment, quoted by Judge Cooper, may be applicable in a situation where a party seeks, for the first time, to file a notice of appeal after the expiration of the thirty-day period, clearly it has no application in the present case. The language emphasized by Judge Cooper should be examined:

> "Thus the maximum time allowable under this rule for filing an appeal is thirty days after the entry of an order . . ." (A140).

The significant language therein is "for filing an appeal". It does not say that the request must be made within thirty days, nor does the rule itself. It says that the maximum time for filing an appeal is thirty days, and the notice of appeal herein was indisputably filed within thirty days.

It is at this point that the apparent hostility of the Bankruptcy Court and the confusing acts of that court become important, for if any of the papers filed by appellants had been rejected, appellants could have fully complied with the requirements of Rule 802, under anyone's interpretation of that rule.

Appellants argued below that the August 11 letter to Judge Galgay requesting that he file the notice of appeal (A134), was, in effect, a request for an extension of time. This argument was rejected by Judge Galgay and also by Judge Cooper upon the reasoning that (a) it does not request an extension of time, but, rather, filing of the notice; and (b) since counsel did not know the time had expired before he mailed the request, it could not possibly be such a request. While that may be true, appellants submit that, by his actions, Judge Galgay treated the request as a request for an extension of time to file the notice of appeal. He knew the time had expired and he knew that appellants

had intended to appeal any adverse ruling.[4]

When the matter was specifically called to the Bankruptcy Court's attention, by appellants' motion of September 8, 1976, the court had the power to grant a nunc pro tunc extension of time up to and including the actual filing date. As stated in Schwartz v. Pattiz, 41 F.R.D. 456 Aff. 386 F 2d 300 (8th Cir. 1968):

> "All courts have the inherent power to enter orders nunc pro tunc to show that a thing was done at one time which ought to have been shown at that time. It is an entry now for something previously done so that the record may actually speak the truth."

---

4. Appellant does not argue that the bankruptcy judge had actual knowledge of these events. The Rules of Bankruptcy Procedure specifically provide that the referee may delegate any ministerial function to an assistant in his office (Rule 506). The Bankruptcy Act itself, however, mandates certain statutory duties of the bankruptcy judge (Bankruptcy Act, Sec. 39) and Part XIII of the Rules establishes an entirely new procedure for reviewing an order or judgment of a referee. The basis for Judge Galgay's Order denying appellants' application for an extension of time to file a notice of appeal was that the Court had no jurisdiction to entertain the application while the appeal to the district court was pending (A133). By the same token, however, if appellants' notice of appeal filed August 16, 1976 was not timely, why did the Bankruptcy Court accept it, and cause the appeal to be entered on a docket? Clearly, the Court had jurisdiction to perform the act. Bankruptcy Act, Sec. 38(b). Having done so, appellants submit that at the very least the court below should have considered that general equitable principles would have dictated a different result.

Appellants' nunc pro tunc argument was rejected by the District Court as "unwarranted". In his opinion, Judge Cooper commented that, "Such action would give the Bankruptcy Court the potential power to revive an appeal at any time." He further observed that, "Rule 802(c) expresses the congressional policy of curbing the inherent discretionary power some courts asserted in granting extensions of time for appeal after the original time had expired".

Bankruptcy Rule 802(c), however, was not promulgated by Congress, but by the Supreme Court -- and the amount of consideration given to those rules has been publicly questioned by a member of that body. As Mr. Justice Douglas has observed:

> "The court is merely the conduit for the rules. It does not purport to approve or disapprove. As I have said on other occasions, it has merely placed its imprimatur on the rules without reading, let alone discussing, these rules." 411 U.S. 992, 37 L. Ed. 2d XXXI (1973).
>
> "As I have said before, 'I cannot agree to the court's submission of the proposed bankruptcy rules to the Congress' . . . because this court is no more than a 'rubber stamp', I think it should not participate in the rulemaking process." 421 U.S. 1021, 44 L. Ed. 2d XXXIII (1975).

In any event, the source of the bankruptcy rules is the same as that of the Federal Rules of Civil Procedure. And F.R.C.P. 60(b) specifically provides for relief from judgments or orders under the circumstances enumerated therein. Thus, the granting of appellants' motion below would not only not be contrary to any congressional policy, but would be in accordance with the underlying policy of the Federal Rules, namely, to insure that justice is done.

III

BY DIRECTING OR CAUSING THE FILING OF APPELLANTS' NOTICE OF APPEAL, THE BANKRUPTCY JUDGE, IN EFFECT, GRANTED AN EXTENSION OF TIME TO FILE SUCH NOTICE OF APPEAL TO AUGUST 16, 1976.

Appellants, on their application for reargument or reconsideration, urged that the filing of the notice of appeal by or at the direction of the bankruptcy judge constituted the granting of an extension of time by him. Neither Judge Galgay's nor Judge Cooper's opinions discuss this point.

Under the facts of this case, appellants submit that Judge Galgay's directing or causing the notice of appeal to be filed was a grant of appellants' request to file the notice of appeal and, therefore, should be deemed tantamount to the granting of a request for an extension of time. If the court intended otherwise -- if the court intended to reject appellants' notice of appeal as untimely and to require a formal request for extension of time to file notice of appeal -- appellants submit that it was an abuse of the court's discretion and power for it to simply cause the filing and docketing of appellant's notice of appeal, and proceed to request and accept the filing fee and designation of records and issues on appeal, only to later bar appellants from any remedy whatsoever on the ground of untimeliness. Appellants submit that it is an abuse of discretion for the court to thus rely on its own actions to, in effect, keep appellants "out of court".

IV

THE BANKRUPTCY COURT SHOULD HAVE GRANTED RECONSIDERATION AND REARGUMENT OF ITS ORDER DATED SEPTEMBER 14, 1976, DENYING APPELLANTS' FORMAL MOTION FOR AN EXTENSION OF TIME AND, UPON SUCH REARGUMENT, SHOULD HAVE GRANTED APPELLANTS' APPLICATION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL OR, IN THE ALTERNATIVE, IN THE INTEREST OF JUSTICE, SHOULD HAVE VACATED THE ORDER ENTERED JULY 29, 1976, AND RE-ENTERED SAME IN ORDER TO PERMIT A TIMELY FILING OF THE NOTICE OF APPEAL.

On September 14, 1976, Judge Galgay denied appellants' formal motion for an extension of time to file the notice of appeal to August 16, 1976. Appellants subsequently moved, by order to show cause, pursuant to Rules 59 and 60(b) of the Federal Rules of Civil Procedure, for:

(a) reconsideration and rehearing of the Memorandum, Opinion and Order dated September 14, 1976, and, upon reconsideration and rehearing, that appellants' application for an extension of time be granted or, in the alternative,

(b) an order vacating the order appealed from entered July 29, 1976 (which order dismissed the class action) and entry of such order so as to permit appellants to file a timely notice of appeal.

The Bankruptcy Court denied this motion in all respects by Memorandum, Opinion and Order dated October 1, 1976, which opinion addressed the question of reconsideration and reargument, but failed to address the question of whether, in the interest of justice, the court should have vacated its original order entered July 29, 1976.

The Affidavit of Jon Moss, Esq., sworn to September 17, 1976, and submitted to the Bankruptcy Court on appellants' motion for reargument, asserts the following uncontroverted facts:

> "11. Had the Notice of Appeal merely been lodged, rather than filed, or if it had been rejected as untimely or because the filing fee was unpaid, I would have separately requested an extension of time, pursuant to Rule 802(c), before making another attempt to file the Notice of Appeal.
>
> 12. The Neilson memo, however, led me to believe that my request to Judge Galgay had resulted in a valid filing, subject to the payment of the $10.00 filing fee. It was believed that, upon the prompt payment thereof, the appeal would proceed in the normal course. Accordingly, on August 20, 1976, I mailed for filing Appellants' Designation of Record and Issues on Appeal. A copy of my transmittal letter is attached hereto as Exhibit "F". The filing stamp thereon indicates a filing date of August 24, 1976.
>
> 13. At all times during the 30-day period within which a Notice of Appeal may be filed, I believe that my request to the Judge had been acted upon, the Notice of Appeal filed, and that all was in order."(A100).

As previously pointed out, if Judge Galgay had rejected appellants' notice of appeal and/or returned the notice of appeal

to California counsel without causing the same to be filed, the entire problem would have been obviated. Appellants would then have had ample opportunity to make a formal request for an extension of time. The time to do so did not expire until August 30, 1976. Whether or not Judge Galgay's causing the notice of appeal to be filed was intended to be the grant of an extension of time, or whether it should be deemed to be an extension of time, it is submitted, under the policy and language of F.R.C.P. 60, that it was an abuse of discretion to deny appellants' motion for an extension of time up to and including the date the notice of appeal was actually filed.

That term -- "discretion" -- was defined by the Supreme Court of the United States in Langnes v. Green, 282 U.S. 531 (1931), as follows:

> "The term 'discretion' denotes the absence of a hard and fast rule. The Styria, Scopinich, Claimant v. Morgan, 186 U.S. 1, 9, 22 S.Ct. 731, 46 L. Ed. 1027. When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." 282 U.S. 531 at 541.

It is for "what is right and equitable under the circumstances" that appeallants herein appeal and it is submitted that obtaining "a just result" is a "reason justifying relief from the operation of the judgment". F.R.C.P. 60(b)(6).

> "Rule 60(b)(6) of the Federal Rules of Civil Procedure allows a district court to relieve a party

"from a final judgment for 'any . . . reason justifying relief from the operation of the judgment.' This section 'vests powers in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.' Klapprott v. United States, 335 U.S. 601, 615, 69 S. Ct. 384, 398, 93 L. Ed. 266 (1949). (Emphasis Supplied.)

See also Kelly v. Greer, 334 F. 2d 434 (3rd Cir. 1964), where the Appellate Court vacated the orders of the District Court, dismissing the actions, stating:

"But there can be no question of the power of a Federal District Court to vacate its own orders entered in civil actions over which it had original jurisdiction 'whenever such action is appropriate to accomplish justice.'" (Citations omitted.)

In Bibeau v. Northeast Airlines, Inc., 429 F. 2d, 212 (District of Columbia 1970), the Appellate Court reversed the order of the District Court which refused to reinstate a wrongful death action after that action had been dismissed for want of prosecution under a local rule. The Court of Appeals held that it was an abuse of discretion to deny the motion to reinstate the case. The facts there showed that the delay in prosecuting the action was of only a few months' duration, there had been considerable preparation for trial, the appellant's former attorney had been ill and had filed an affidavit indicating that he had never received a notice of impending dismissal which was required by the rule and he would have taken action to avoid dismissal if he had been given due notice. Significantly, the local rule provided, as does Rule 922 of the Bankruptcy Rules, that failure of the Clerk to give notice did not relieve a party from

the operation of the rule. In the case at bar, the delay in the filing of the notice of appeal was exactly the same as the delay in New York counsel's receiving notice of entry of Judge Galgay's order.

In Oliver v. City of Shattuck, 157 F. 2d 150 (3rd Cir. 1947), the appellants had moved for relief from a judgment under Rule 60 of the Federal Rules of Civil Procedure, alleging that they had entered into an oral agreement (not called to the attention of the court) under which the appellants agreed not to take an appeal from a judgment, but that the ultimate judgment in the case would abide the final disposition of another case that had been appealed. The trial court had denied themotion, although it recognized that the rule contained a saving provision the manifest purpose of which was to preserve intact the inherent power of the courts to entertain remedial actions for relief against judgments traditionally recognized as common law. The Appellate Court reversed the District Court and held that it was within the equitable power of the court to grant the appellant's motion, stating at page 153:

> "One of the long recognized grounds of relief from a judgment is an agreement or understanding between the parties, which if observed would have obviated the judgment, especially if the agreement operated to lull the judgment debtor into security and inactivity in order that some unconscientious advantage could be taken of him." (Citations omitted).

Similarly here, although there was no agreement in question, appellants were lulled into security and inactivity on

the assumption that their notice of appeal had been properly filed by or at the direction of Judge Galgay and, therefore, took no action with respect to the notice of appeal, except to pay the requested filing fee and to file the designation of record.

Some other examples of F.R.C.P. 60(b)(6) relief include Schwartz v. Pattiz, supra, where plaintiff sought to correct nunc pro tunc the record made in a suit which had been settled several years previously. The District Court stated that although the motion was not so framed, plaintiff was entitled to relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure. Faced with a res judicata contention by defendant in a new action, the court stated that, on the face of the record without the correction, the dismissal of the earlier suit with prejudice might be held to constitute an adjudication on the merits of the entire claim asserted in the earlier suit and to "permit such inequitable result solely because of clerical and ministerial omissions for which plaintiff is not responsible would not accord with right and justice." Accordingly, the clerk of the court was directed to correct the record to show that an amended complaint was filed by leave of court on December 15, 1962, to file said amended complaint as of December 15, 1962, and then re-enter the filing of the stipulation for dismissal as of January 11, 1963.

In Weilbacher v. United States, 99 F. Supp. 109 (So. Dist. N.Y. 1951), an application was made for an order

vacating and setting aside an order of the District Court which had been entered upon a stipulation dismissing the appeal from a judgment entered in a prior action. The libelant had asserted that he entered into the stipulation dismissing his appeal from a judgment entered in a prior action. The libelant had asserted that he entered into the stipulation dismissing his appeal solely because of a decision of the Supreme Court of the United States which suggested to the libelant that further prosecution of his appeal would be futile. Subsequent to the Supreme Court decision, however, a statute was enacted under which it seemed clear that if the libelant had pursued his appeal and the Circuit Court had affirmed the judgment appealed from solely on the basis of the Supreme Court case, he would be entitled to institute the present action. Libelant argued that his substantial right should not have been forfeited by his inability to anticipate the ultimate wording of the statute and his refusal to prosecute an apparently futile appeal. The court held that the broad language of Rule 60(b), particularly subsection (6), vested it with power to vacate the order of dismissal and, under the circumstances, justice demanded that the court exercise that power. Thus, the court in effect removed the bar to prosecution of the appeal presented by the order of dismissal. Similarly here, the court ought to remove any bar to the prosecution of appellants' appeal from the order of Judge Galgay entered on July 29, 1976.

CONCLUSION

Appellants are entitled to their day in court. It would be inequitable and an abuse of discretion, under the circumstances of this case, to deny them that day in court based upon the filing of the notice of appeal seven days beyond the expiration of the ten-day period afforded by Bankruptcy Rule 802(a). F.R.C.P. 60 gives the court the power to grant appellants the relief they have requested, and the ends of justice require that that power be exercised to grant said relief. The orders below should be reversed and the cause remanded to the Bankruptcy Court with directions to either grant, nunc pro tunc, an extension of time to file notice of appeal to and including August 16, 1976, or to vacate and re-enter the order of July 29, 1976, so as to afford appellants the opportunity to file a timely notice of appeal from said order.

Dated: March 17, 1977

Respectfully submitted,

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JON MOSS, Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

ROBERT BISULKO, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 123 1/2 CHRISTIE ST. NEW YORK, N.Y.

That on the 21 day of MARCH, 1977, deponent personally served the within APPELLANT'S BRIEF

upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing~~ ~~true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

WACHTELL, LIPTON, ROSEN + KATZ
ATTORNEYS FOR DEFENDANT-APPELLEE
299 PARK AVE.
NEW YORK, N.Y. 10017

Robert Bisulko

Sworn to before me this
21st day of March, 1977
Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978